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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 837

UNITED STATES EX REL. LORING J. WHITESIDE
Petitioner

vs.

J. EDWARD SLAVIN AND GEORGE R. TIERNAN
Respondents

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

BRIEF OF THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the court below is reported in 309 F.2d 322 and it affirmed the judgment of the United States District Court for the District of Connecticut denying a petition for habeas corpus because of failure to exhaust state remedies.

QUESTIONS PRESENTED

1. Does the petitioner's failure to exhaust state remedies make habeas corpus unavailable to him in the federal courts?

2. Is there any exceptional circumstances that provides a basis for relaxing the requirement of exhaustion of state remedies?

STATEMENT

This is a petition for certiorari to the United States Court of Appeals for the Second Circuit following its difference of a judgment of the United States District Court for the District of Connecticut denying a petition for habeas corpus because of a failure to exhaust state remedies.

The petitioner had been convicted of four counts of a twenty-three count information for criminal libel before a jury in the Court of Common Pleas of the county of New Haven, State of Connecticut. The conviction was affirmed by the Connecticut Supreme Court of Errors, *State of Conn. vs. Whiteside*, 148 Conn. 208, 169 A.2d 260 (1961); reargument was denied and the United States Supreme Court denied certiorari, October 9, 1961.

The petitioner for the first time alleged two constitutional questions in his petition for habeas corpus in the United States District Court, namely (1) denial of a bill of particulars deprived him of a right under the Sixth Amendment to be fully informed of the charges against him, (2) prejudice of the justices of the Connecticut Appellate Court deprived him of due process of law under the Fourteenth Amendment.

He did not seek a writ of habeas corpus in the state courts although it was available to him. Section 52-466 General Statutes of Connecticut. He never requested the Connecticut courts to pass on the asserted constitutional rights.

ARGUMENT

I.

THE DECISION OF THE COURT BELOW IS CORRECT. THE PETITIONER DID NOT EXHAUST STATE REMEDIES AVAILABLE TO HIM.

The remedy of habeas corpus is not available if the petitioner failed to exhaust state remedies. He is not deemed to have exhausted the remedies available in the courts of the state if he has the right under the law of the state to raise by any available procedure, the question presented.

28 U.S.C.A. 2254;

Parr vs. *Burford*, 339 U.S. 200 (1950);

Brown vs. *Allen*, 344 U.S. 443 (1952);

Williams vs. *LaVallee*, 276 F.2d 645 (2d Cir. 1960)

Habeas corpus was available to the petitioner in the state courts. Connecticut General Statutes, Section 52-466. He could have presented the constitutional questions to the state courts by this method. He did not do so. He could have raised one of the questions on appeal to the Connecticut Supreme Court of Errors. He did not do so.

As Judge Anders said:

> "At no time have the courts of the State of Connecticut passed upon the merits of the Federal Constitutional questions raised by the petitioner in his application." (Pet. Brief, A-4)

This was reasserted in the opinion of the court below. 309 F.2d 322.

Clearly the petitioner failed to exhaust state remedies and habeas corpus is not available to him.

II.

THERE ARE NO EXCEPTIONAL CIRCUMSTANCES IN THIS CASE THAT WOULD PROVIDE A BASIS FOR INTERVENTION BY A FEDERAL COURT JUSTIFYING ABANDONMENT OF ITS PRECEPT OF EXHAUSTING STATE REMEDIES FIRST.

The petitioner raised the constitutional questions for the first time in the habeas corpus proceeding. His belated claim of not being properly informed of the charge by the trial court's denial of a motion for a bill of particulars was not assigned as error in his original appeal. He made a wholesale attack on the criminal information on the appeal but he did not assign error on constitutional grounds.

The claim of prejudice of the Justices of the Connecticut Supreme Court was raised by the petitioner in his former petition for certiorari which was denied by this court in October, 1961.

In the United States District Court the petitioner was afforded an ample opportunity to present evidence relative to his claim of prejudice. He presented none.

CONCLUSION

The lower court affirmed the judgment of the United States District Court of Connecticut. Habeas corpus is not available to the petitioner in the federal courts because he did not exhaust state remedies.

Therefore this petition for certiorari should be denied.

Respectfully submitted,

GEORGE R. TIERNAN,
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March 18, 1963.